COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2018 CR 00895**
vs.	:	**Judge McBride**
JEFFREY A. KIRK	:	**DECISION/ENTRY**
Defendant	:	

Robert D. Barbato, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Greg Hoffman, assistant public defender and counsel for the defendant Jeffrey A. Kirk, 302 E. Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of a motion to suppress filed by the defendant Jeffrey A. Kirk.

On October 2, 2018, the defendant Jeffrey A. Kirk was indicted on one charge of aggravated possession of drugs, methamphetamine, in violation of R.C. 2925.11(A), a felony of the fifth degree.

The defendant filed his motion to suppress on November 19, 2018.The court held an evidentiary hearing on the motion on December 12, 2018.

On January 4, 2019, the defendant filed a memorandum in support of his motion to suppress. The state filed its memorandum in opposition to the motion on January 9th. On January 29th, in accordance with the court's briefing/hearing schedule, the court took the motion under advisement.

Upon consideration of the motion, the record of the proceedings, the evidence presented for the court's consideration, the written arguments of counsel, and the applicable law, the court now renders this written decision.

STANDARD OF REVIEW

A motion to suppress is defined as "a device used to eliminate from a criminal trial evidence that has been secured illegally, generally in violation of the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self incrimination), or the Sixth Amendment (right to assistance of counsel, right of confrontation, etc.) of the United States Constitution."[1] When a defendant's motion to suppress is successful, the principal remedy for a constitutional violation is to exclude the evidence from the criminal trial.[2]

Pursuant to Crim.R. 12(C), before trial "any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue." A motion to suppress evidence "on the ground that it was illegally obtained" must be made prior to trial.[3]

In filing a motion to suppress, the defendant "shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought."[4] The

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[1] *State v. Scruggs*, 12th Dist. Clinton No. CA2005-11-042, 2007-Ohio-6416, ¶ 4, citing *State v. French*, 72 Ohio St.3d 446, 449-50 (1995).
[2] *State v. Haines*, 12th Dist. Clermont No. CA2003-02-015, 2003-Ohio-6103, ¶ 8.
[3] Crim.R. 12(C).
[4] *State v. Way*, 12th Dist. Butler No. CA2008-04-098, 2009-Ohio-96, ¶ 7, quoting Crim.R. 47.

defendant must "state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided."[5]

When a defendant moves to suppress evidence recovered during a warrantless search, the state has the burden of showing that the search fits within one of the defined exceptions to the Fourth Amendment's warrant requirement. *State v. Banks-Harvey*, 152 Ohio St.3d 368, 2008-Ohio-201, 96 N.E.3d 262, ¶ 18, citing *Athens v. Wolf*, 38 Ohio St.2d 237, 241, 313 N.E.2d 405 (1974).

A motion to suppress typically "presents mixed questions of law and fact."[6] In reviewing such a motion, "the trial court, as the trier of fact, is in the best position to weigh the evidence in order to resolve factual questions and evaluate witness credibility."[7]

FINDINGS OF FACT

The charges in the instant case arose from an incident that occurred on July 26, 2018. Between 6:00 and 7:00 p.m., Officer Randall Ruehrwein, a police officer with the Village of Williamsburg Police Department, was driving on State Route 133 in Clermont County, Ohio when he observed the defendant Jeffrey A. Kirk in the parking lot of a Dollar

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[5] *Way*, 2009-Ohio-96 at ¶ 7, quoting *State v. Wood*, 12th Dist. Clermont No. CA2007-12-115, 2008-Ohio-5422, ¶ 10.

[6] *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 7, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5373, 797 N.E.2d 71, ¶ 8. *See State v. Minton*, 12th Dist. Warren No. CA2017-08-132, 2018-Ohio-2142, ¶ 12, citing *State v. Bell*, 12th Dist. Clermont No. CA2008–05–044, 2009–Ohio–2335, ¶ 8 (holding same).

[7] *State v. Deluca*, 12th Dist. Butler No. CA2016-03-055, 2017-Ohio-1235, ¶ 9, citing *State v. Vaughn*, 12th Dist. Fayette No. CA2014-05-012, 2015-Ohio-828, ¶ 9. *See Codeluppi*, 2014-Ohio-1574 at ¶ 7, citing *Burnside*, 2003-Ohio-5373 at ¶ 8 (explaining that when the trial court reviews a motion to suppress "the court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses.").

General near the dumpster and loading area. Officer Ruehrwein noticed that the defendant was trying to attach a large object to the front of his bicycle. At that point, he pulled into the parking lot, parked his police cruiser approximately ten feet from the defendant, and made contact with him.

Officer Ruehrwein asked the defendant to identify what the object was, to which the defendant replied that it was a band saw. He asked the defendant for identification, but the defendant did not have any on his person. Instead, the defendant provided his name and social security number.

Officer Ruehrwein told the defendant, "I will be back within a minute." The defendant stayed with his bike, and Officer Ruehrwein went to his police cruiser and ran the defendant's information through LEADS for the purpose of checking for warrants. After being in the cruiser for a "couple" minutes, he learned that the defendant had a warrant for his arrest in Kentucky. He returned to the defendant, advised him of the warrant, and informed the defendant that he would pat him down and secure him.

At that point the defendant fled, and Officer Ruehrwein chased him for a brief period before securing him. Once secured, Officer Ruehrwein patted the defendant down prior to arresting him, and in doing so he discovered methamphetamine on his person.

LEGAL ANALYSIS

The Fourth Amendment to the United States Constitution protects people against "unreasonable searches and seizures."[8] Similarly, the Ohio Constitution provides: "The

[8] Fourth Amendment to the United States Constitution.

right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated."[9] The United States Supreme Court has long observed that "'[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'"[10]

The Fourth Amendment, however, does not prohibit "all contact between the police and citizens, but is designed 'to prevent arbitrary and oppressive interference with enforcement officials with the privacy and personal security of individuals.'"[11] In the Fourth Amendment context there are three types of police encounters: "(1) consensual encounters; (2) investigatory stops; and (3) seizures that equate to an arrest."[12] "Only in the latter two categories, where an officer restrains an individual's liberty through some means of physical force or show of authority, does a seizure occur for purposes of the Fourth Amendment."[13]

A consensual encounter between police officers and individuals "does not trigger Fourth Amendment scrutiny."[14] A Fourth Amendment violation does not occur "simply because a police officer approaches an individual and asks a few questions."[15]

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[9] Ohio Constitution, Article I, Section 14.
[10] *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), citing *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891).
[11] *I.N.S. v. Delgado*, 466 U.S. 210, 215, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984), quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 3074, 49 L.Ed.2d 1116 (1976).
[12] *State v. McLemore*, 10 N.E.3d 1186, 2014-Ohio-2116, ¶ 9 (9th Dist.), citing *State v. Patterson*, 9th Dist. Summit No. 23136, 2006-Ohio-5424, ¶ 11.
[13] *State v. Wynne*, 10th Dist. Franklin No. 18AP-531, 2019-Ohio-1013, ¶ 12, citing *State v. Westover*, 10th Dist. No. 13AP-555, 2014-Ohio-1959, ¶ 12.
[14] *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d, 59 USLW 4708 (1991), paragraph one of the syllabus, citing *Terry*, 392 U.S. at 1, 19, fn. 16.
[15] *Bostick*, 501 U.S. at 433.

Moreover, no seizure occurs merely by asking the individual for identification[16] or by asking an individual his or her name and social security number.[17] This is so even when police officers lack a basis for suspecting an individual of wrongdoing.[18] The encounter is consensual so long as the police officers do not "by means of physical force or show of authority" restrain the liberty of an individual.[19]

To determine whether an individual has been detained, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"[20] The United States Supreme Court has named examples of police conduct that may indicate to an individual that he or she is not free to leave, including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might by compelled."[21] Even so, "[i]n determining whether a particular encounter between an officer and a citizen constitutes a seizure, [courts] recognize that words alone may be enough to make a reasonable person feel that he would not be free to leave."[22]

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[16] Id. at 437.
[17] *See State v. Adderholt*, 12th Dist. Butler No. CA99-02-044, 1999 WL 791528, *1-3 (Oct. 4, 1999) (finding an officer engaged only in a consensual encounter with the defendant where he simply asked the defendant his name and social security number).
[18] Id. at 434-35, citing *I.N.S.*, 466 U.S. at 216.
[19] Id.
[20] Id. at 437.
[21] *U.S. v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).
[22] *United States v. Richardson*, 385 F.3d 625, 629–30 (6th Cir.2004), citing *United States v. Buchanon*, 72 F.3d 1217, 1223 (6th Cir.1995). *See also State v. Rackow*, 9th Dist. Wayne No. 06–CA–0066, 2008–Ohio–507, ¶ 16 (an encounter may become a seizure where "[t]he circumstances, including the officer's choice of words, would have implied to the reasonable person that he was not free to walk away from the officer[.]").

The Sixth Circuit Court of Appeals examined how "words alone" can transform a consensual encounter into an illegal detention in the case of *United States v. Richardson*, 385 F.3d 625 (6th Cir.2004). In *Richardson*, an officer initiated a traffic stop of a car containing four individuals. The officer asked the driver to step out of the car and told him that he was going to issue a warning citation.[23] After asking the driver about his travel plans, the officer gave the driver a citation and shook his hand. The driver then turned around to return to his vehicle. At that point, the officer asked the driver a few more questions and then told him: "Okay, just hang out right here for me, okay?"[24] Ultimately, the officer asked the occupants of the vehicle to step outside and when a search was conducted, a gun was found on one of the occupants, who was subsequently charged with possession of a firearm by a convicted felon.[25]

The defendant, Richardson, filed a motion to suppress in the district court, which was granted, and the prosecution appealed.[26] The Sixth Circuit Court of Appeals noted that once the purpose for a traffic stop has been completed, the police cannot further detain individuals unless something occurred during the stop to cause an officer "'to have a reasonable, articulable suspicion that criminal activity was afoot,'" which was not present in that case.[27]

In this vein, the Sixth Circuit Court of Appeals concluded that the traffic stop in *Richardson* ended when the officer gave the driver the citation and shook his hand.[28] At that time, the driver was free to leave, but the officer then asked him to "just hang out right

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[23] *Richardson*, 385 F.3d at 628.
[24] Id. at 627–628.
[25] Id. at 628.
[26] Id.
[27] Id. at 629, quoting *United States v. Hill*, 195 F.3d 258, 264 (6th Cir.1999).
[28] *Richardson*, 385 F.3d at 630.

here for me, okay?"[29] Despite the fact that the officer's demeanor was not coercive, the Sixth Circuit stated that the officer's "words alone were enough to make a reasonable person in [the driver's] shoes feel that he would not be free to walk away and ignore Officer Fisher's request. When the driver is not free to leave, neither are his passengers; indeed, the passengers are at the mercy of any police officer who is withholding the return of their driver."[30] As a result, the court held that a seizure had occurred, and the officer was required to have the required reasonable suspicion for the seizure.[31] The court then concluded that under the totality of the circumstances, the officer lacked a reasonable suspicion of criminal activity. As a result, the court affirmed the district court's decision to suppress evidence.[32]

There are also a number of cases from the Tenth District Court of Appeals that examine the impact of officers asking individuals for their identification and sometimes retaining that identification for the purpose of warrant checks. In *State v. Wynne*, 10th Dist. Franklin No. 18AP-531, 2019-Ohio-1013, the defendant claimed his interaction with officers was an investigatory detention because the officers' actions constituted a show of authority that would lead a reasonable person to believe he was not free to leave or terminate the encounter. Specifically, the defendant asserted that by using his personal information to run a warrant check the officers implicitly commanded him to remain where he was and indicated they suspected him of criminal activity.[33] Similar to the defendant in the instant case, the *Wynne* defendant did not have his identification card but gave

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[29] Id.
[30] (Citation omitted.) Id. at 630.
[31] Id.
[32] Id. at 630–631.
[33] *State v. Wynne*, 10th Dist. Franklin No. 18AP-531, 2019-Ohio-1013, ¶ 14.

officers his name, birthdate, and social security number.[34] One officer used that information to perform a warrant check while another stayed with the defendant and continued talking to him.[35] The appellate court concluded that this interaction was nothing more than a consensual encounter, explaining:

> "[W]e conclude the use of Wynne's identifying information, which he provided verbally to the officers, to conduct a warrant check did not constitute an implicit command to remain on the scene, and that a reasonable person in Wynne's position would not believe he was not free to leave or otherwise terminate the encounter. There was no evidence Wynne knew that Officer Bogard was conducting the warrant check. Officer Bogard did not testify he advised Wynne that he was checking for warrants or requested Wynne wait while the warrant check was underway."[36] (Emphasis added.)

Similarly, the Tenth District Court of Appeals found in *State v. McDowell*, 10th Dist. No. 13AP–229, 2013-Ohio-5300, that no illegal seizure of the defendant occurred. In *McDowell*, the defendant was walking in an alley when a police officer approached him, asked him some questions, and asked for his identification.[37] The defendant handed his identification to the officer, and the officer stepped back to his cruiser where wrote down the defendant's general information before handing the identification back to him 30 seconds later.[38] The court concluded that no seizure occurred, making the following observations about the totality of the circumstances:

> "We note that the entire interaction between appellant and Green, from start to finish, did not involve an overt show of force or authority. Green testified that he did not activate the light bar on top of his cruiser when he pulled up near appellant. He did not order appellant to stop or halt upon approaching, nor did he raise his voice or otherwise use

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[34] Id. at ¶ 15.
[35] Id.
[36] (Emphasis added.) Id. at ¶ 17.
[37] *State v. McDowell*, 10th Dist. No. 13AP–229, 2013-Ohio-5300, ¶ 4.
[38] Id. at ¶ 5.

> forceful language. He testified that appellant was likewise calm and cooperative. Green denied using the words "before I let you go" or otherwise indicating to appellant that he was not free to leave. Green was the only officer present, he did not draw his weapon, and he did not physically touch appellant until the end of the encounter when he confiscated appellant's firearm. These circumstances are, generally, indicative of a consensual encounter."[39] (Emphasis added.)

On the other end of the spectrum, in *State v. Tabler*, 10th Dist. Franklin No. 14AP-386, 2015-Ohio-2651, the Tenth District Court of Appeals reached the opposite conclusion under slightly different facts. In *Tabler*, an officer parked a car's length behind two individuals who were seated in a parked car.[40] The officer approached the car, spoke with the individuals, and asked them for their identification information.[41] The officer then took the identification with him back to his police cruiser and ran a warrant check.[42] The trial court and appellate courts agreed that, under the totality of the circumstances, what began as a consensual encounter escalated into an illegal seizure when the officer retained the identification and conducted the warrant check.[43] In explaining the outcome, the appellate court cited an earlier decision involving a warrant check and retained licenses, in which it was observed: "[c]ontrary to the state's assertions, no reasonable person would believe that he or she is free to terminate the encounter and simply drive away when an officer retains his or her driver's license for the purpose of running a computer check for outstanding warrants."[44]

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[39] (Emphasis added.) Id. at ¶ 30.
[40] *State v. Tabler*, 10th Dist. Franklin No. 14AP-386, 2015-Ohio-2651, ¶ 3.
[41] Id. at ¶ 9.
[42] Id.
[43] Id. at ¶ 37.
[44] Id. at ¶ 32, quoting *State v. Jones*, 188 Ohio App.3d 628, 2010–Ohio–2854, ¶ 25 (10th Dist.). *See State v. Westover*, 2014-Ohio-1959, 10 N.E.3d 211, ¶ 21 (10th Dist.) ("We hold that, when Sergeant Jackson retained defendant's identification and took it to her cruiser to run a warrants check, defendant was unconstitutionally seized under the Fourth Amendment.").

In turning to the present case, the state posits that Officer Ruehrwein's encounter with the defendant was consensual up until the point of learning that the defendant had a warrant for his arrest in Kentucky. At that point, the state argues that Officer Ruehrwein had probable cause to arrest the defendant. The defendant, on the other hand, maintains that Officer Ruehrwein's consensual encounter ended when he left the defendant to conduct a warrant check, at which point the defendant was illegally detained.

The above case law clarifies several aspects involved in this case. First, Officer Ruehrwein's initial conversation with the defendant was consensual. His request for the defendant's identification did not transform the encounter into a seizure. Second, collecting the defendant's name and social security number and walking back to the police cruiser to run a warrant check, by itself, is not problematic. And third, multiple factors that may indicate that a detention is occurring were absent, such as the threatening presence of several officers, the display of a weapon, some physical touching of the defendant, or a tone of voice indicating that compliance with the officer's request might be compelled.

The critical inquiry remains, however, whether Officer Ruehrwein's statement to the defendant that he would "be back in a minute" transformed the consensual encounter into an illegal detention. As discussed, "words alone may be enough to make a reasonable person feel that he would not be free to leave."[45] Officer Ruehrwein's words did not explicitly command the defendant to wait for him. However, the obvious and clear implication of Officer Ruehrwein's statement is that he expected the defendant to wait for him until he returned from his cruiser. It is akin to telling a person to wait a minute, or, as in the *Richardson* case, to asking a person to "hang out right here for me, okay?" The

[45]*Richardson*, 385 F.3d at 629–30, citing *Buchanon*, 72 F.3d at 1223.

court finds that Officer Ruehrwein's words alone were enough to make a reasonable person in the defendant's shoes feel that he would not be free to walk away and ignore Officer Ruehrwein's implied request. As such, the defendant was illegally detained at that moment.

"If the seizure is unlawful, any evidence obtained after the unlawful seizure must be suppressed as the 'fruit of the poisonous tree.'"[46] As such, the methamphetamine that Officer Ruehrwein discovered upon arresting the defendant shall be suppressed.

CONCLUSION

For the foregoing reasons, the defendant's motion to suppress is well-taken and is hereby granted.

Counsel shall contact the Assignment Commissioner (513-732-7108) within three business days of the date of this Decision/Entry in order to schedule a status conference, which shall be held within three weeks.

IT IS SO ORDERED.

DATED: 7-1-15

Judge Jerry R. McBride

[46] *Jones*, 2010–Ohio–2854 at ¶ 27, quoting *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

CERTIFICATE OF SERVICE

I certify that copies of the within Entry have been sent on this 15th day of July 2019 by e-mail to Robert D. Barbato, Assistant Prosecuting Attorney, at rbarbato@clermontcountyohio.gov, and to Greg Hoffman, Attorney for the Defendant, at ghoffman@clermontcountyohio.gov. Printed copies were provided to the Prosecuting Attorney's Office, the Public Defender's Office, and the Probation Department.

Judicial Assistant to Judge McBride